IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 522.

LESTER COLE,

Petitioner,

vs.

LOEW'S, INCORPORATED, a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Court of Appeals is found at pages 992-1040 of the Record; and is reported in 185 F. 2d 641.

Jurisdiction.

The judgment of the Court of Appeals reversing the judgment of the District Court and remanding the cause for a new trial was entered on November 22, 1950. [R. 1041.] The petition for ~~rehearing~~ certiorari was presented on January 29, 1951, and notice of filing was served on February 2, 1951. Jurisdiction of this Court arises under sections 1254(1) and 2101(c) of U. S. Code, Title 28.

Statement of the Case.[1]

The controversy which gives rise to this litigation may be summarized as follows:

Petitioner was employed by respondent as a writer under a contract which in part provided that petitioner would conduct himself with due regard to public conventions and morals and would not do anything that would tend to bring him into public scorn or contempt or shock or offend the community or prejudice his employer or the motion picture industry. [R. 12.] In 1947 the Committee on Un-American Activities of the House of Representatives conducted a public hearing as part of its inquiry regarding alleged Communist infiltration of the motion picture industry. [R. 321, 505.] Petitioner as a witness, and as one of a group with which he was publicly identified, refused to disclose whether he was or had been a member of the Communist Party. [R. 478-84, 362, 379-86, 284-7.] He was cited for contempt of the Congress. [R. 808.]

The hearing and the conduct of petitioner and his associates received intensive nation-wide publicity through all media of news distribution. [R. 351-3, 471, 651, 656-64, 778, 859; Defts. Exs. G and H, R. 783-4.] Respondent contended that the conduct of petitioner in connection with said hearing created a wide-spread belief (a) that he was a Communist and held in contempt the Congress and the fundamental institutions of this country; and (b) that the respondent and the industry employed

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[1]Respondent reluctantly presents a statement of the case because it is thought that only by that procedure can it effectively point out what are believed to be omissions and inaccuracies in petitioner's statement (herein designated as "P. S."). So that the court may more readily compare the two statements, respondent will substantially follow petitioner's order of presentation.

and harbored Communists and were sympathetic and indulgent toward Communism. Respondent further contended that petitioner's conduct (in violation of the beforementioned provisions of his employment contract, variously referred to as the "public relations" or "morals" clause) brought or tended to bring petitioner into public scorn and contempt, tended to shock and offend the community and prejudiced the interests of the respondent and the motion picture industry, and, consequently, that petitioner had breached his contract. [R. 3-4.]

Respondent served petitioner with a notice that his employment and compensation were suspended (because of his breach of the contract provision just referred to) until he had been acquitted or had purged himself of the contempt of Congress and had declared under oath that he was not a Communist. [R. 3-4.]

The controversy was presented to the court through an action for declaratory relief instituted by petitioner, in which he asserted his right to a continuance of his compensation and employment and alleged that respondent did not have the right to suspend either upon the grounds stated in the notice of suspension or on any other grounds. As an incident, petitioner alleged in conventional form the irreparable injury flowing from the suspension and prayed that respondent be enjoined from continuing the suspension in force. [R. 5-6.]

Upon the demand of the respondent for a jury trial "of all issues triable to a jury" [R. 41-42] the case was tried before a jury to whom all issues, except that of petitioner's right to an injunction, were submitted in the form of special verdicts. [R. 163-4.] In the trial court the case was tried upon the theory and all evidence was directed

to the proposition that, if the jury found that petitioner had breached the above-referred-to provision of his employment contract, he was not entitled to his compensation or a continuance of his employment. There was no suggestion by petitioner during the trial or on appeal that a jury verdict to that effect would be merely advisory. There was, however, a contention by petitioner in the trial court and in the Court of Appeals that the conditions of the suspension were not proper and a counter-contention by respondent that they were, and that, in any event, if there had been a prior breach of his contract obligations by petitioner, this would excuse performance by respondent of its contract obligations, including the payment of compensation to petitioner.

The verdict of the jury [R. 163-4] and the consequent judgment of the trial court was that petitioner had not violated his contract and was entitled to enforce it. Judgment was entered for petitioner's contract compensation to December 30, 1948, in the sum of $75,600; that respondent pay further compensation until the expiration of the contract; and that it withdraw its notice of suspension. [R. 184-192.]

On appeal respondent attacked the judgment on the ground that it had not had a fair trial because of erroneous exclusion and admission of evidence, because of errors in the trial court's charge to the jury, and because of the refusal of the trial judge to disqualify himself. The Court of Appeals reversed on the basis of respondent's contentions except as to the disqualification of the trial judge.

In his brief on appeal, petitioner for the first time advanced a contention that the parties had placed a practical construction on the contract which excluded his complained-of conduct before the Committee from the so-called

"public relations" or "morals" clause. Notwithstanding respondent's objection that such a contention was not open to petitioner because it raised an issue not presented, considered or determined below, the Court of Appeals considered but rejected petitioner's contention. [R. 1013.]

Corrections and Additions to Petitioner's Statement.

A sound picture and a separate sound record of petitioner's appearance before the Committee were introduced at the trial.[2] [R. 478-484, 484-5, 701.]

It was stated by the respondent in connection with an objection to certain evidence offered by petitioner [R. 863-4] that no evidence had been introduced to show financial or monetary loss suffered by respondent through petitioner's conduct. The statement was not an admission that no financial loss had been suffered.[3] [See P. S. p. 6.]

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[2]No mention is made by petitioner of the fact that respondent sought unsuccessfully to introduce a sound picture showing the conduct and testimony of petitioner in conjunction with that of nine other witnesses [R. 651, 721-2, 731-6, 827-8, 850-5, 622-3, 715-16] with whom it appeared, as stated by the Circuit Court, petitioner had collaborated as to their joint conduct before the Committee and without which, as pointed out by the Circuit Court, the true import of petitioner's behavior on the witness stand could not be judged. [R. 1039-40. See Argument, paragraph 10, *post.*]

[3]Injury to respondent's reputation did not require a money measurement and was implicit in the public reaction which respondent was not permitted to prove and of which the court refused to instruct the jury as a matter of judicial knowledge. Moreover, injury from an employee's breach is not a necessary condition to the exercise of the employer's rights. [*Bank of America v. Republic Productions,* 44 Cal. App. 2d 651, 654, 112 P. 2d 972, 974; *May v. New York M. Pic. Corp.,* 45 Cal. App. 396, 404, 187 Pac. 785, 788; *Jerome v. Queen City Cycle Co.,* 163 N. Y. 351, 57 N. E. 485, 487; *Farmer v. First Tr. Co.* (C. C. A. 7), 236 Fed. 671, 673; *Von Heyne v. Tompkins,* 89 Minn. 77, 93 N. W. 901, 903-4; *Brown v. Dupuy* (C. C. A. 7), 4 F. 2d 367, 369.]

Negotiations for a revision of the contract between the parties were carried on during the spring and summer of 1947 and resulted in September in an amendment beneficial to petitioner. During the negotiations petitioner raised the question as to whether the revision was being delayed because of assertions in a trade publication that petitioner was a Communist. Petitioner was given assurance that respondent was not interested in petitioner's politics or these charges. [R. 256-8, 304-6, 318-20, 353-4, 376-7, 396-405, 434-40, 549-72.][4] In the course of the discussions petitioner stated that he had an opportunity for other employment and would be willing to cancel his contract with respondent.[5] [R. 403, 438.]

In September, 1947, one of respondent's executives told petitioner that a U. S. Marshal had a subpoena for him for the hearing before the Committee and, after petitioner had indicated that he did not want to avoid service, he was served in the office of the head of respondent's contract department, who, immediately afterwards, said, "Now that that is over, let us get down to our business." [R. 446-8.]

Before the amendment to the contract was executed, petitioner had a non-contract discussion with Louis B. Mayer, head of respondent's studio, in which Mayer told petitioner that investigators for the Committee had inquired about petitioner's political affiliations and had been told by Mannix, respondent's studio manager and vice-president, that he didn't give a damn whether petitioner

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[4]This evidence, which was later a basis for the claim of waiver or condonation, was introduced without intimation of such purpose and over respondent's objection that the negotiations were merged in the written amendment of the contract. [R. 431-2, 434-7.]

[5]Except as indicated, respondent was not "notified." [See P. S. p. 7.]

was a Communist or a Democrat or a Republican. Mayer said he would make the same statement. Mayer told petitioner of Mayer's plans for him and expressed the wish that petitioner would curtail the activities that caused talk about his being a Communist. Petitioner assured Mayer that petitioner was not a Communist.[6] [R. 348-51, 440-43.]

In the spring of 1947, Eric Johnston, president of Motion Picture Association of America, Inc., was turned down on a suggestion that the industry refuse to employ "proven Communists."[7] [R. 810-11.]

Before going to Washington nineteen men (who became known as the "unfriendly witnesses"), of whom petitioner was one, joined in an "open letter" to the industry. [R. 638-43.] These men were jointly represented during the hearing by a battery of six lawyers. [R. 415-18.] They conferred together prior to and during the hearing as to the manner in which they would conduct themselves during the hearing [R. 638-56] and agreed as to that conduct. [R. 362-3.] Eleven of the unfriendly witnesses testified at the hearing [R. 426]—ten before petitioner was called [R.

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[6]The petition refers to the Mannix conversation as transmitted by Mayer, which differed from Mannix's own version. [R. 298-301.] Petitioner's version of his conversation with Mayer, but solely as to the part unfavorable to respondent, was presented—on the issue of waiver—in the charge to the jury. [R. 907-9.]

[7]Petitioner seems to suggest that this was known to him at an early date [P. S. p. 6] but there is no evidence that he had heard of it before the Committee hearing, at the same time that he heard Johnston (characterized by petitioner [P. S. p. 7] as "the spokesman for the industry") testify that he would not employ any proven Communist. [R. 506-13.]

533, 646]—and it is a fair inference that ten, including petitioner, refused to answer whether they were Communists.[8] [R. 362, 379-86, 284-7.]

Immediately before the hearings the attorneys for the "unfriendly witnesses" requested and held a meeting with representatives of the Association of Motion Picture Producers. It was concerned with a motion to quash being filed by the unfriendly witnesses and the position to be taken by the industry at the hearings. The industry representatives said that they had publicly welcomed the hearing and could not attack its legality. At the close of the hearing, in reply to a suggestion that he had agreed with the Committee on a blacklist, Johnston said he had not and would not stand for any such thing. [R. 405-28, 737-49, 768-72.]

Both before and during the hearings Johnston and Paul V. McNutt, an attorney specially employed to represent the industry at the hearings, issued certain oral and written statements as indicated by the petition. [P. S. pp. 8, 9 and 10.] The substance of these can be summed up in the words of the Circuit Court as indicating that "the employers as well as the employees resented and disliked the whole investigation . . ." [R. 1014.]

In May, 1947, a sub-committee held a closed hearing in Los Angeles to the accompaniment of nation-wide publicity. [R. 351-2, 321, 638-43, 755.] Investigators for the committee achieved added publicity in June, 1947. [R. 287-91, 299-300, 321-34, 758-9.] The actual hearing ran from October 20, to October 30, 1947. Various prominent

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[8]None of these facts which, among others, led the Circuit Court to conclude that evidence as to the conduct of all ten should have been admitted [R. 1039-40] appear in the petition.

members of the industry were witnesses, including petitioner and ten others of the unfriendly witnesses—plaintiff being the last of these to testify. [R. 321, 505-6, 417-19, 501, 620-1, 625, 644-6, 411-12, 525-6, 533, 535.] Petitioner not only refused to answer the inquiry as to whether he was or had been a Communist but he attacked the motives of the Committee. [R. 478-84.] Immediately upon leaving the witness stand he distributed to the press over a hundred copies of a statement (derogatory to the Committee) which he had prepared before the hearing and sought to read at the hearing. [R. 473-5, 859.] The hearings were so thoroughly communicated to the public by every media of communication as to make them the leading topic of news and discussion.[9] [R. 351-3, 471, 651, 656-64, 778, 859; Defts. Exs. G and H, R. 783-4.]

Before petitioner took the witness stand he heard Mr. Mayer testify that the latter was unalterably opposed to Communism; that Communists should be denied the sanctuary of the freedom they sought to destroy, and that if he knew that men employed by him believed in Communism he would not keep them in his employ.[9] [R. 363-7, 505-6, 513-19.]

Respondent's first knowledge that petitioner intended not to answer questions relating to Communist membership and that he intended to defy the Committee in this regard came through learning of petitioner's actual conduct on the witness stand.[9] [R. 309-10, 351, 420-1, 499, 743-4.]

On the train returning from the Washington hearing Howard Strickling, respondent's public relations director, told petitioner that Mayer was terribly upset over the re-

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[9]None of these facts appear in the petition.

sults of the hearing and particularly "about the effect of this" on petitioner; that he was seeking some public relations formula—some statement which petitioner could make which the studio could publicize or some other method —which would overcome what he felt was a bad press and "whereby we could, Mr. Trumbo and myself, get out of this." [R. 574-6, 682-3.]

Mr. Mayer and petitioner then had a discussion in which Mayer told petitioner that he had had bad advice and had acted very unwisely because, if he belonged to the Communist Party, that was no crime, as Mayer saw it, and petitioner should have answered; that petitioner would not have had any problem on his hands; that petitioner had a great opportunity if this thing hasn't sprung up but Mayer didn't know what this would do. Petitioner replied that he "had to stick with the gang."[10] [R. 362-3.]

Petitioner returned to work. At the time of his suspension he had been cited for contempt but the citation had not matured into a court action [R. 808] and at the time of trial he had not been convicted [R. 859-862], but of the fact that he was guilty of contempt there could be no serious question.[11] [See P. S. pp. 10, 11.] After

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[10]The petition contains no reference to the Mayer testimony heard by petitioner, nor to the Strickling conversation, nor to respondent's ignorance of petitioner's intention to defy the Committee and only an innocuous reference (from petitioner's standpoint) to the conversation with Mr. Mayer. [P. S. p. 10.] This was part of the evidence—favorable to respondent—not referred to in the trial court's charge relative to waiver.

[11]*Barsky v. U. S.*, 167 F. 2d 241; *Josephson v. U. S.*, 165 F. 2d 82; *Lawson v. United States* and *Trumbo v. United States*, 176 F. 2d 49, *cert. den.*, 339 U. S. 934.

returning to work, after his conversation with Strickling about public relations and after learning of the declaration of policy (presently referred to), petitioner issued an affidavit which, if anything, was more contemptuous of the Committee than his conduct on the witness stand.[12] [R. 687-9.]

As a consequence of the conduct of the unfriendly witnesses and the resulting nation-wide furor, representatives of respondent and of a large majority of the motion picture producing companies, after discussions extending over November 24 and 25, 1947, and with the advice of counsel, adopted a declaration of policy to the effect that of the "ten Hollywood men . . . cited for contempt . . ." those who were then employed would be discharged or suspended and none of the ten would be employed or re-employed until he had been acquitted or purged of contempt and had declared under oath that he was not a Communist. [R. 336-9, 354-7, 389-95, 784-92, 812-17.]

The discussion which led up to the adoption of the policy was gone into at some length but subject to a limiting ruling that it was admitted only to show the nature of the discussion and not as evidence of the facts recited.[13]

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[12]Not mentioned in the petition.

[13]Portions of the meeting's proceedings and its accomplishment, *i.e.*, the policy declaration, were introduced by petitioner but respondent was denied the introduction of evidence showing that the reasons for the adoption of the policy were the conduct of the unfriendly witnesses and the public reaction to that conduct.

[R. 385-6, 792-3.] The discussion in summary was one in which it was the consensus that the unfriendly witnesses had led a substantial part of the public to believe that they were Communists and that the motion picture industry was harboring Communists and fostering Communism; that the unfriendly witnesses, as a consequence, had shocked and offended the community and brought themselves and the industry into public scorn and contempt; and that the retention or employment of the unfriendly witnesses would create new and aggravate already created public ill-will against the industry.[14] [R. 786-92, 380-95.]

On December 2, 1947, petitioner was given his notice of suspension.[15]

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[14]See the petition's restricted account of this meeting which is there characterized as a decision "to blacklist a group of persons, including petitioner." [P. S. p. 11.]

[15]The petition states as a fact that "the respondent's executives bowed to that policy (declaration) with obvious reluctance." It appears clearly that the declaration of policy was joined in voluntarily by respondent and that the suspension was dictated by its executives. [R. 282-7, 336-40, 354-7, 375-6, 385-95, 784-93, 812-17.] There is no evidence to the contrary. Had there been an unwarranted interference by third parties, the only result would be a cause of action against them. As between the parties to the contract, the question is not why the employer acted but whether he had the right so to act. (*May v. New York M. Pict. Corp.*, 45 Cal. App. 396, 404, 187 Pac. 785, 788; *Development Co. v. King* (C. C. A. 2), 161 Fed. 91, 93; *Comerford v. Inter. Harvester*, 235 Ala. 376, 178 So. 894; 39 C. J. 89, Sec. 90; 56 C. J. S. 435, Sec. 44.)

Questions Presented.

1. In an action seeking a judgment declaring the rights and duties of the parties under a contract of employment, in which action the controversy centered around petitioner's claim that respondent had violated the contract by suspending his compensation and employment and respondent defended on the ground that its refusal of further performance was justified and excused by petitioner's prior breach, were special verdicts of the jury, directed to issues of fact relating to petitioner's breach, verdicts at law or were they merely advisory so as to render immaterial serious and prejudicial errors in the trial court's charge to the jury?

2. Assuming the answer to the foregoing question to be that the verdicts were only advisory, may that question be raised for the first time in a petition for a writ of *certiorari* and without prior presentation to the Court of Appeals?

3. Under a contract of employment by which the employee has agreed to conduct himself with due regard to public conventions and morals and not to do or commit any act that will tend to bring him into public hatred, scorn or contempt or shock, insult or offend the community or prejudice his employer, and there is credible evidence that the employee engaged in public and extensively publicized conduct which involved the commission of a crime, brought him into contempt of Congress, and led the public generally to believe that he was then a member of the Communist Patry, may it be found that the employee violated his agreement?

4. On the facts recited in question 3 above, may it be urged for the first time on a petition for a writ of *cer-*

tiorari and without prior presentation to the Court of Appeals that the Court of Appeals erred in holding that such conduct could have been found to have been without due regard to public morals and conventions, simply because that precise contention was not made by respondent in the Court of Appeals, although it was contended there that the agreement generally had been violated by petitioner?

5. In the action referred to above, was it error for the District Court to have instructed the jury:

(a) On the law of libel, although no issue of libel or defamation was in any way involved;

(b) That the Communist Party was a lawful organization in the State of California, notwithstanding that a statute of that state makes it a felony to advocate the overthrow of government by force or violence, and the respondent, on petitioner's objection that the evidence was irrelevant, was precluded from proving that the Communist Party in fact engaged in such advocacy;

(c) That in answering a special verdict as to whether petitioner's breach of contract had been waived by respondent's conduct *after* the breach had occurred, the jury could and should consider and give effect to evidence of respondent's conduct *before* that breach?

6. Did the District Court err in excluding evidence which would have shown the publicly discrediting conduct of others with whom the petitioner had conspired to bring about that conduct and with whom petitioner was associated in the public mind and for whose conduct petitioner was legally responsible under state law?

Argument.

1. While it is no doubt the rule that a final judgment of a Court of Appeals is not an indispensable prerequisite of review on *certiorari,* it is still true that "it has been a marked characteristic of the Federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance . . . Only in very few situations, where intermediate rulings may carry serious consequences, has there been a departure from this requirement of finality for Federal appellate jurisdiction . . ." [*Radio Station WOW, Inc. v. Johnson,* 326 U. S. 120, 123-4, in which the mode of review was *certiorari.*] Here, the judgment to which the petition is directed is not final, for it remands the cause to the District Court for a new trial. [R. 1041. *Gospel Army v. Los Angeles,* 331 U. S. 543, 546.] Of course, the writ of *certiorari* does not issue merely to provide "the defeated party in the Circuit Court of Appeals another hearing . . ." [*Magnum Import Co. v. Coty,* 262 U. S. 159, 163.] So, in the case of a non-final judgment, only reasons of pressing public importance will ordinarily justify further review after decision by a Court of Appeals. [*Hamilton Shoe Co. v. Wolf Brothers,* 240 U. S. 251, 258.]

No such reason for review is to be found in the case at bar. In essence the action is an ordinary contract suit between private persons. Because the incidents which give rise to the controversy occurred in the course of a widely publicized hearing before the Committee on Un-American Activities, and related to that Committee's inquiry into the menace of Communism, the case has a dramatic and even a sensational quality not often found in contract actions. But the questions of law which it precipitated are only those which are usually to be found in private contract

litigation. Important as these questions may be to the parties, there is nothing of such public consequence about them as to justify the intervention of the Supreme Court of the United States.

2. The reversal of the District Court's judgment was impelled by a number of prejudicial errors in the charge to the jury and in rulings on the exclusion of evidence. If it be assumed (contrary to the fact, as will be shown in a moment, paragraph 3, *post*) that errors in the charge were immaterial because the jury's verdict was advisory only, as petitioner contends [Petition, pp. 16-22], the errors in evidentiary rulings remain to be dealt with. They were not rendered immaterial by the asserted advisory nature of the jury's participation in the case. These erroneous rulings withdrew from consideration testimony which, if admitted and considered by the trial court, might well have changed the result. [R. 651, 721, 731, 828-44, 357-8, 782-4, 823, 593-603, 613-17, 674-77, 590-619.]

These errors were, by themselves, enough to justify reversal of the judgment. [R. 1032, 1038-40.] It is, therefore, immaterial and no ground for *certiorari* that the matter of the charge was incorrectly disposed of by the Court of Appeals, if in fact it did err in that regard. Petitioner insists quite vigorously that errors in the charge adverse to respondent were immaterial because the jury's verdict was only advisory and, therefore, the trial judge was entitled to come to an independent conclusion on the facts. Assuming that to be so, he is in no position to complain of a judgment of reversal supportable on *other grounds* and which, in respect of the charge to the jury, can affect him only by inducing an erroneous but similarly immaterial charge at the second trial.

3. In point of fact the contention, that the jury's verdicts were advisory and the charge therefore of no consequence, is incorrect. To be sure, the action is in form one for a declaratory judgment. But, whatever may be the classification of such actions in the state courts, in the Federal system they are neither legal nor equitable, but *sui generis*. [*Pacific Indemnity Co. v. McDonald* (C. C. A. 9), 107 F. 2d 446, 448; *Hargrove v. American Cent. Ins. Co.* (C. C. A. 10), 125 F. 2d 225, 228; *Great Northern Life Ins. Co. v. Vince* (C. C. A. 6), 118 F. 2d 232, 233-4, *cert. den.* 314 U. S. 637; Borchard, Declaratory Judgments (1934), p. 120]. The Declaratory Judgments Act [28 U. S. Code, Sec. 2201] is a procedural statute, adding a new remedy for cases of which the Federal courts already had jurisdiction. [*Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123* (C. C. A. 5), 137 F. 2d 176, 179, *affirmed* 321 U. S. 590.] It does not transform into a suit in equity a controversy which, apart from the Act, would be determined by an action at law.

The right to have a jury trial of an issue of fact in declaratory actions [F. R. C. P., Rule 57], therefore, depends on the nature of the ultimate claim or defense upon which the issue bears. If the issue is one which, in the absence of a declaratory judgment statute, would be triable to a jury of right it is so triable when the action is for declaratory relief. [*Pacific Indemnity Co. v. McDonald, supra,* 107 F. 2d at 448-9; *Aetna Casualty etc. Co. v. Quarles* (C. C. A. 4), 92 F. 2d 321, 325; *United States Fidelity etc. Co. v. Koch* (C. C. A. 3), 102 F. 2d 288, 291; *Piedmont Fire Ins. Co. v. Aaron* (C. C. A. 4), 138 F. 2d 732, 734.]

An issue of fact by itself is neither legal nor equitable. It draws its coloration from the surrounding environment. [*Pacific Indemnity Co. v. McDonald, supra,* 107 F. 2d at 448.] It is the nature of the controversy, not the method of its presentation, that is determinative. [*Cf., Aetna Life Ins. Co. v. Haworth,* 300 U. S. 227, 244.] The question whether certain conduct did or did not take place, and whether it did or did not have certain consequences, may be legal or equitable depending on the nature of the claim or defense to which it is directed. Here, that claim was breach of contract and consequent liability to pay money damages; the defense was excused performance because of petitioner's prior breach. In that context the issues of fact were legal; a jury trial was a matter of right; and the jury's verdicts were as conclusive as they would have been if returned in an action at law for damages. [*Dickinson v. General Accident F. & L. Assur. Corp.* (C. C. A. 9), 147 F. 2d 396, 397; *Lumbermens Mut. Cas. Co. v. Timms & Howard* (C. C. A. 2), 108 F. 2d 497, 499.] And that result follows even though an equitable claim is also made in the action, if that claim depends on the same facts as the law claim. [*Bruckman v. Hollzer* (C. C. A. 9), 152 F. 2d 730, 732.]

The only equitable relief sought below was an injunction to compel respondent to set aside its suspension notice, *i.e.,* to reinstate petitioner in his contract employment. [R. 6.] Whether that relief could be given depended on exactly the same facts as were at the foundation of the claim at law. The relief awarded in this respect was not mandatory, but alternative. The judgment ordered reinstatement *or* payment of damages. [R. 188-9.] In effect, then, the judgment awarded purely legal relief, for

respondent was under no compulsion to reinstate. The judgment could have been fully satisfied by a money payment.

4. The injunctive feature of the case is now *moot,* as it also was at the time of the decision of the Court of Appeals. The contract term of petitioner's employment expired on November 14, 1949.[16] [R. 24, 33.] The most that could have been given him at the time the Court of Appeals acted, or that can be given him on a second trial, is a money judgment. On the legal phases of the case, which were all that were open in the Court of Appeals, the jury's verdicts were not and could not have been treated as advisory. The extent to which they might otherwise have been advisory, is now merely an academic question. *Certiorari,* of course, does not issue to review moot points. [*Cf., C. M. Patten & Co. v. U. S.,* 289 U. S. 705; *First Union Trust & Savings Bank v. Consumers Company,* 290 U. S. 585, 586.]

5. Petitioner's contention as to the advisory nature of the jury's verdicts, upon which all else in his petition hinges, is made for the *first time* in this Court. It was not made in his briefs or supplemental memoranda in the Court of Appeals. It was not made in oral argument. Nor was it presented by a petition for rehearing. The nearest approach to it was the assertion, in argument at the bar of the Court of Appeals, that the trial court's

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[16]The judgment of the Court of Appeals was rendered on November 22, 1950. [R. 1041.] Of course the propriety of an injunction depends on the situation at the time of judgment in the Court of Appeals. [*American Steel Foundries v. Tri-City C. T. Council,* 257 U. S. 184, 201; *Dr. Miles C. Co. v. Sontag C. Stores Co.,* 8 Cal. 2d 178, 179, 64 P. 2d 726.]

finding on a matter allegedly not submitted to the jury (*i.e.*, that petitioner had been led by respondent's acts to believe his conduct before the Committee on Un-American Activities would not be considered a breach of contract [R. 177-8]) was sufficient by itself to support the judgment.[17] There was not, even in connection with that contention, the slightest intimation of any claim that the verdicts, as far as they went, were only advisory.

The point now sought to be made is, therefore, not open to petitioner, because not made below. [*Helvering v. Minnesota Tea Co.*, 296 U. S. 378, 380. *Cf., Zellerbach Paper Co. v. Helvering*, 293 U. S. 172, 182; *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 100; *U. S. v. Hoffman*, 335 U. S. 77, 79.] Certiorari does not issue when the question sought to be reviewed is not available on the record. [*McCullough v. Kammerer Corp.*, 323 U. S. 327, 328; *Tyrell v. District of Columbia*, 243 U. S. 1, 5-6; *Furness, Withy & Co. v. Yang-Tsze Ins. Ass'n*, 242 U. S. 430, 431, 433-4.]

6. The contention that the trial court's findings as to the true meaning of the contract and "waiver" of its provisions before breach in themselves support the judgment of the District Court [Petition pp. 22-30] is without merit. So far as the "waiver" finding is concerned, it is true that the special verdict submitted in that regard was limited, at respondent's request, to conduct occurring after

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[17]The short answer to that contention is that the matter was submitted to the jury under the general heading of "Waiver." This is made clear when special verdict 4 is read in the light of the charge on waiver, in which the jury were specifically told that if there was such inducement by respondent, petitioner's breach of contract had been waived. [R. 907-9, 961.] See paragraph 6, *post*.

petitioner's breach of contract. [R. 920.] But that limitation was completely nullified by the charge on waiver, in which, at the very outset, the jury were told they could find a waiver from respondent's conduct *prior* to petitioner's breach.[18] [R. 907-10.] Waiver arising from antecedent conduct was, therefore, a matter submitted to the jury. The verdict on that issue could not properly have been overriden by the trial judge. The serious errors in the charge in that regard, which undoubtedly affected the jury's conclusion on the subject of waiver, were, therefore, material and prejudicial. In fact, this very conflict between the narrow scope of the special verdict and the all-inclusive breadth of the charge was alone reversible error.

So far as interpretation of the contract is concerned, it cannot be denied that ascertainment of meaning and legal effect is a question of law. [*Estate of Platt,* 21 Cal. 2d 343, 352, 131 P. 2d 825, 830, and cases there cited; *Floyd v. Ring Const. Corp.* (C. C. A. 8), 165 F. 2d 125, 129, *certiorari denied* 334 U. S. 838; *Bell v. Bruen,* 1 How. (42 U. S.) 169, 183.] True enough, when extrinsic evidence is produced in aid of interpretation, and that evidence is *conflicting,* the fact-trier's resolution of the conflict is given the same conclusiveness as any other finding of fact. But when there is no such evidence, or such as there is has not been contradicted, the interpretation of the contract, in the light of the undenied extrinsic facts, is still a question of law. So too is it a question of law

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[18]The actions and statements referred to in the charge as supplying the basis for a finding of waiver all occurred before the petitioner testified before the Committee. [R. 471-86, 453-7, 459-60, 463-4, 809-12.]

when, to determine the legal effect of a contract, the extrinsic evidence is accepted in the version most favorable to the prevailing party. [*Union Oil Co. v. Union Sugar Co.,* 31 Cal. 2d 300, 314, 188 P. 2d 470, 478-9; *Estate of Platt, supra,* 21 Cal. 2d at 352, 131 P. 2d at 830, and cases there cited; *Ewing v. Von Nieda* (C. C. A. 8), 76 F. 2d 177, 181.]

The Court of Appeals gave full effect to the extrinsic evidence produced by petitioner. It disregarded none of it. [R. 998-1013.] Accepting that evidence as true for purposes of its consideration, it was entitled to differ from the trial court as to the legal effect of that evidence and thus arrive at a different conclusion of law as to the meaning of the contract.

Furthermore, if the interpretation assertedly made by the trial court was sound, that is, if conduct of the sort indulged in by petitioner was not within the proscription of the contract, there was nothing in that regard to submit to the jury. Yet, the trial court did submit special verdicts with respect to that conduct and its effect on the public. That could only have been done on the tacit assumption that if verdicts were returned in respondent's favor petitioner's breach of contract would be fully established as a matter of fact; from which the only correct conclusion of law would have been that respondent was excused from performing its part of the bargain. [*Los Angeles Gas etc. Co. v. Amalgamated Oil Co.,* 168 Cal. 140, 143, 142 Pac. 46, 47-8; *Los Angeles Gas Co. v. Amalgamated Oil Co.,* 156 Cal. 776, 778, 106 Pac. 55, 57; *Towney v. People's Ice Co.,* 66 Cal. 233, 234, 5 Pac. 158, 159; *Dunn v. Daly,* 78 Cal. 640, 644-5, 21 Pac. 377,

378-9; *Kulawitz v. Pacific etc. Paper Co.*, 25 Cal. 2d 664, 669, 155 P. 2d 24, 27; *California Sugar etc. Agency v. Penoyar*, 167 Cal. 274, 280-1, 139 Pac. 671, 674; *Wood etc. Co. v. Seurich*, 5 Cal. App. 252, 253-5, 90 Pac. 51, 52; *Rathbun v. Security Mfg. Co.*, 82 Cal. App. 793, 796, 256 Pac. 296, 297; *Cameron v. Burnham*, 146 Cal. 580, 584, 80 Pac. 929, 930.] That having been the theory submitted to the jury, respondent was entitled to have the jury correctly instructed on matters bearing upon their consideration of this phase of the case. The Court of Appeals did no more than give effect to this plain right of the respondent.

7. With the impressive preface that the case at bar "raises an important question in the administration of justice and substantive law, viz.: whether contractual promises under our legal system are 'no more than teasing illusions' . . ." petitioner goes on, somewhat anticlimactically, to argue that the Court of Appeals found petitioner's conduct to have violated a clause of the contract not specifically mentioned in the notice of suspension. [Petition pp. 30-33.] The clause in question is found in the same short paragraph of the contract upon which the notice was based [R. 12]; and the conduct found to have been a violation is the identical conduct to which the notice was expressly directed. In holding that this conduct could have been found, under proper instructions, to have been a violation of the contract and, therefore, a lawful excuse for respondent's refusal to perform further, the Court of Appeals followed, rather than disregarded, relevant precedent.

It is well established that when an employer is sought to be held for an allegedly wrongful termination of an

employment contract, he may justify on any ground which in fact existed at the time, even though not then assigned as the reason for his action. [*In re Nagel* (C. C. A. 2), 278 Fed. 105, 109; *Farmer v. First Trust Co.* (C. C. A. 7), 246 Fed. 671, 673; *Carpenter Steel Co. v. Norcross* (C. C. A. 6), 204 Fed. 537, 539-40; *Independent L. Ins. Co. v. Williamson,* 152 Ky. 818, 822, 154 S. W. 409, 411; *Macauley v. Press Pub. Co.,* 170 App. Div. 640, 646, 155 N. Y. S. 1044, 1048, *affirmed* 222 N. Y. 696, 119 N. E. 1055. The cases are collected in: 39 C. J. 89, notes 70. 72; 56 C. J. S. 428, note 20; 56 C. J. S. 435, Sec. 44.] The Court of Appeals gave effect to that rule. Cases, such as those cited by petitioner at page 32, finding an estoppel, by judgment or by conduct, to rely on an additional ground are, of ocurse, in a different category. No issue of estoppel was tendered here. There is no showing of such prejudicial reliance on the notice as would have created any estoppel; and, of course, there is no claim of estoppel by judgment. [R. 84-5.]

It cannot be seriously argued that commission of a crime is not contrary to public conventions or morals. Nor is the crime which petitioner committed any less so because it precipitated a test of the powers of a Committee of the Congress. This Court has never sustained the *right* to refuse to answer pertinent inquiries of such a committee. [*In re Chapman,* 166 U. S. 661, 668, 671; *Sinclair v. U. S.,* 279 U. S. 263, 294-6. See, also: *Lawson v. U. S.* (App. D. C.), 176 F. 2d 49; *certiorari denied,* 339 U. S. 934; *Barsky v. U. S.* (App. D. C.), 167 F. 2d 241, 250, *certiorari denied,* 334 U. S. 843; *U. S. v. Josephson* (C. C. A. 2), 165 F. 2d 82, 88, *certiorari denied,* 333 U. S. 838; *Dennis v. U. S.* (App. D. C.), 171 F. 2d 986, 987-8, *af-*

firmed 339 U. S. 162.] All that it has done is to hold that the wilful refusal to answer, which is punishable as a crime, is still wilful and criminal even though brought about by a *bona fide* belief that the question is impertinent instead of by some evil purpose. [*Sinclair v. U. S., supra,* 279 U. S. at 299.]

8. The judgment of reversal can be and is supported without regard to the Court of Appeals' determination that respondent was entitled, as a condition of continuing petitioner's employment, to require that he purge himself of contempt and swear that he was not a Communist. [R. 1025-29.] Assuming those conditions to have been beyond respondent's power to impose, their imposition amounted, in legal effect, only to a violation of the contract by respondent. But, as the Court of Appeals properly held, if it were found that petitioner's conduct was itself violative of the contract, respondent was excused from performing, notwithstanding its breach, because petitioner's violation occurred first. [R. 1028-9.] That holding is plainly in accord with the California rule [Cases cited at conclusion of paragraph 6, *ante*], by which the substantive rights of the parties are necessarily controlled. [*Erie R. Co. v. Tompkins,* 304 U. S. 64.] It is thus seen that the question posed by petitioner need not be reached to uphold the judgment of the Court of Appeals; and, therefore, should not be made the basis for further review on *certiorari.*

The argument that the views of the Court of Appeals in this respect were contrary to state law, is untenable. [Petition, p. 35.] In California, while judicial notice of the Communist Party's advocacy of violent overthrow of government is not taken, such advocacy in fact is unlawful and criminal and, of course, may be proved as a fact when

relevant. [*Cal. Stats,* 1919, c. 188, p. 281; *Whitney v. California,* 274 U. S. 357, 368-72; *People v. McClennegen,* 195 Cal. 445, 452, 234 Pac. 91, 94; *People v. Taylor,* 187 Cal. 378, 385-90, 203 Pac. 85, 87-90; *People v. Steelik,* 187 Cal. 361, 369-70, 203 Pac. 78, 81. See, *Danskin v. San Diego etc. Dist.,* 28 Cal. 2d 536, 544-5, 171 P. 2d 885, 890-1. Cf. 18 U. S. Code, sec. 11 (1946 ed.), 18 U. S. Code, sec. 2385 (1948 rev. ed.); *U. S. v. Dennis* (C. A. 2), 183 F. 2d 201, *certiorari granted* ..... U. S. ....., 95 L. Ed. (Adv. Op.), 43.] Had respondent been permitted to prove, as it sought to do and as most people now commonly believe [see, *American Communications Assoc. v. Douds,* 339 U. S. 382, 422-33; *U. S. v. Dennis, supra,* 183 F. 2d at 212, 226 (syl. 23)] that the Communist Party in fact engages in that advocacy, the illegal nature of the party would have been apparent.

Once that fact had been established it would have made inapplicable section 1101-3 of the California Labor Code; for these statutory provisions have been held by the State Supreme Court not to relate to membership in such an unlawful organization. [*Lockheed Aircraft Corp. v. Superior Court,* 28 Cal. 2d 481, 485, 171 P. 2d 21, 22.] The fact was not established in the instant case because of petitioner's objection that it was irrelevant. [R. 829-44.] He is, therefore, in no position to claim the benefits of a statute to which he would not have been entitled had he permitted his opponent to make the evidentiary showing which it offered to make.

9. Petitioner advances in general terms the proposition that the trial court's charge was without error. He discusses specifically, however, only three of the many errors assigned to the charge. [*Petition,* pp. 36-39; R. 984-8.] We confine our reply to those three matters.

The Court of Appeals did not find the charge as to rights of witnesses before Congressional committees free from error. [*Petition,* p. 37.] It expressly held this portion of the charge "erroneous, misleading and prejudicial . . ." [R. 1030]. It was the petitioner who requested a charge on this subject, on the theory that if he acted within his rights before the Committee that fact had a material bearing on the jury question of the public effect of his conduct [R. 108-10, 124-30]; a theory which the trial court adopted and gave to the jury. [R. 911-13.] That being so, it was necessary that the jury should have been told, as it was not (and as has been recently held in respect of the very hearing here involved) that petitioner did not have the right to refuse to answer pertinent questions relating to membership in the Communist Party, and that his wilful refusal to answer was a crime. [*Lawson v. U. S., supra,* 176 F. 2d 49.]

So far as the instruction on libel is concerned, petitioner fails to show its relevancy to the issues here involved. The correctness of the charge as an abstract statement of law does not eliminate the error of having diverted the attention of the jury to a completely extraneous issue. [*U. S. v. Breitling,* 61 U. S. 252, 254-5; *Quercia v. U. S.,* 289 U. S. 466, 470; *Insurance Co. v. Baring,* 87 U. S. 159, 161-2; *Beaver v. Taylor,* 65 U. S. 637, 644; *Cavoretto v. Alaska etc. Min. Co.* (C. C. A. 9), 245 Fed. 853, 854-5.] Nor is that error minimized by the fact that respondent requested that the jury be told, as required by the California law of evidence [*Cal. Code of Civil Procedure,* sec. 2102; *People v. Mayes,* 113 Cal. 618, 625-6, 45 Pac. 860, 862], which is applicable to Federal trials [*F. R. C. P.,* rule 43(a); *Hagen v. Porter* (C. C. A. 9), 156 F. 2d 362, 365], that they should take judicial notice of the fact that many

persons in this country look with scorn and contempt on Communists.

That request was directly responsive to the issue of fact submitted to the jury, *i. e.*, did petitioner's conduct lead the public to believe that he was a Communist and thereby bring him into public scorn and contempt? It was no substitute for that request to give the jury an abstract and wholly irrelevant dissertation on the law of libel.

The instructions as to waiver were *not* given at respondent's request. [*Petition,* p. 38.] Respondent requested no instructions on that subject because it insisted at all times that waiver was not an issue. [R. 945-50, 694-6, 863-7.] What did happen, after the trial court overruled rsepondent in its claim that waiver was not an issue, and had delivered its charge on the subject, was that respondent objected to that charge as incorrect in various particulars. The trial court attempted, but failed, to meet some of these objections by an amendment of the charge. [R. 945-50, 955-62.]

10. The exclusion of evidence of the conduct of nine other persons before the Committee was error. There was evidence below from which it could have been found that petitioner and these nine others had conspired or agreed together to act as they did. [R. 362-3, 415-18, 638-43, 624-33, 648, 425-7, 530, 533, 646.] Under California law, that confederation made each of them fully responsible for the acts of the others in pursuance of the common plan. [*Dodge v. Meyer,* 61 Cal. 405, 421-2; *Mox, Incorporated v. Woods,* 202 Cal. 675, 677-8, 262 Pac.

302, 303; *Revert v. Hesse,* 184 Cal. 295, 301-3, 193 Pac. 943, 946.] Respondent, therefore, was entitled to show all of the publicly discrediting conduct for which petitioner was in law responsible. It was entitled to show that he was a member of a conspiracy, and, therefore, stood in the public eye tarred with the discrediting conduct of his conspirators as well as with his own individual acts.

Conclusion.

Because no question of great public importance is presented, nor is any conflict among the Circuits made out, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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